85-1173

IN THE

SUPREME COURT OF THE UNITED STATES

No. 1173, October Term, 1985

SPANG & COMPANY,

Petitioner,

v.

SAMUEL GRECCO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. May an individual age discrimination plaintiff prevail upon establishing, by competent evidence, a McDonnell Douglas prima facie case supported by evidence of age bias toward other employees directly related to, endorsed by, and participated in by the defendant's Chairman of the Board?

2. Under the Age Discrimination in Employment Act, is it proper to review the legal sufficiency and correctness of the charge as a whole rather than a portion taken out of context?

3. Is it the intent of the Age Discrimination in Employment Act that a wronged employee should be "made whole" so as to justify the award of prospective damages in those instances where, as a result of the defendant's discrimination, judicial discretion dictates that reinstatement is not appropriate and would not provide full or proper relief?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATEMENT OF STATUTE INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	4
I. A. The Decision Of The Court of Appeals Affirming The District Court Finding That Plaintiff's Evidence Was Of Such Weight And Sufficiency As To Support The Plaintiff's Verdict Is Consonant With The Decisions Of This Court And Other Courts Of Appeals On The Subject. In Addition, The Decision Below Turns Upon Its Own Facts And Will Not Affect Others Than The Litigants	4
B. The Decision Of The Court Below Is Consonant With The Decisions Of Other Courts Of Appeals	5
C. The Decision Of The Court Below Turns Upon The Facts Of This Individual Case	6
II. The Court's Charge, Read As A Whole, Correctly Instructed The Jury On Its Responsibilities In Determining This Individual Discrimination Claim	6
III. The Award Of Prospective Damages Provides The Full And Proper Relief Contemplated By The Age Discrimination In Employment Act In Those Cases Where Reinstatement Would Not Be In The Best Interest Of The Parties	7
CONCLUSION	8

TABLE OF AUTHORITIES

Cases: Page

Cooper v. Federal Reserve Bank of Richmond, 104 S.Ct. 2794 (1984) 5

General Telephone Company of Southwest v. Falcon, 457 U.S. 147 (1982) 5

Goff v. Continental Oil Company, 678 F.2d 593 (5th Cir. 1982) 6

Grecco v. Spang & Co., 527 F.Supp. 978 (W.D. Pa. 1981) 4

Grecco v. Spang & Co., 530 F.Supp. 782 (W.D. Pa. 1982) 4

Haskell v. Kaman Corp., 743 F.2d 113 (2d Cir. 1984) 5

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 5, 6

Maxfield v. Sinclair International, 766 F.2d 788 (3d Cir. 1985) 8

Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974) 5

Pace v. Southern Railways System, 701 F.2d 1383 (11th Cir. 1983) 6

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7

U.S. Postal Service Board of Governors v. Aikens, 103 S.Ct. 1478 (1983) 5, 6, 7

United States v. Johnson, 268 U.S. 220, (1925) ... 5, 6

TABLE OF AUTHORITIES—*(Continued)*

Cases: Page

Age Discrimination in Employment Act;
29 U.S.C. §621 1

29 U.S.C. §626(b) 1, 7

Other Authorities:

Internal Operating Procedures for the United States Court of Appeals for the Third Circuit V. A. 2. 6

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondent, Samuel Grecco, respectfully prays that the Petitioner's petition for Writ of Certiorari be denied.

OPINIONS BELOW

The Post Trial Opinions of the District Court and the Circuit Court are appended to the Petitioner's Petition as Appendix A, Appendix B, and Appendix C.

JURISDICTION

Jurisdiction of this Honorable Court to receive the Defendant's Petition for a Writ of Certiorari is not contested.

STATUTE INVOLVED

The Statute involved is the Age Discrimination in Employment Act, 29 U.S.C. §621, et seq. Section 626(b) provides:

> In any action brought to enforce this Chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including, without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or overtime compensation under this section.

STATEMENT OF THE CASE

Samuel Grecco was 53 years of age on October 18, 1978. On and prior to that date, he was Vice President and Chief Financial Officer of Spang & Company.

Spang & Company is and was a diversified corporation with the majority of stock held by the Spang/Rath Family. Frank Rath, Sr. was, at all relevant times, the

Chairman and Chief Executive Officer of Spang & Company and made or concurred in all of the important decisions dealing with the corporation. Rath, Sr.'s son, Frank Rath, Jr., was second in command in the Spang Stores Division of Spang & Company.

Grecco was employed for 19 years with Spang & Company and grew into the position of Vice President and Treasurer, Chief Financial Officer and Member of the Board of Directors. In that position he had corporate administrative responsibility in the administrative, accounting, finance and data processing areas. Although Rath, Sr. appointed a nominal successor to Grecco, subsequent to Grecco's termination and prior to the time of trial, all of Grecco's major duties and responsibilities were being performed by Frank Rath, Jr. who became Vice Chairman and who was, at the time of trial, 35 years of age.

At trial, in his case in chief, the Plaintiff produced evidence that:

> (1) the management of Spang & Company consciously discriminated on the basis of age in the reassignment of pharmacists when Sun Drug Stores, a part of Spang Stores Division, went from two-man to one-man pharmacy operations,[1]
>
> (2) Frank Rath, Jr., with the concurrence of Frank Rath, Sr., engaged in an open course of conduct of harassment of older employees directly causing the termination or resignation of those older employees who were then replaced by younger employees,[2]
>
> (3) Frank Rath, Sr., the Chairman of the Board, and Frank Rath, Jr. openly vocalized their preference for younger employees,[3]

1. Testimony of Frank Adams.

2. Testimony of Adams, Eiben, Diulus, Reffner, Curry and Grecco.

3. Testimony of Curry and Grecco.

(4) Frank Rath, Jr. openly and publicly vocalized his disdain for older employees, including Grecco,[4]

(5) Frank Rath, Jr. embarked on a course of conduct, particularly the creation of a specious "Memo", which was patently intended to set up a basis for the Plaintiff's termination.[5]

(6) Prior to his termination, Grecco had received no complaints about his work; in fact had received a merit wage increase, and was given sensitive corporate assignments in the months immediately preceding his termination. Grecco was terminated with no warning, no explanation and no discussion of possible causes.[6]

In its case, Spang offered oral testimony in support of its alleged justifications for the plaintiff's termination. In addition, it offered a group of statistics developed by or under the direction of Spang's General Counsel. A Professor of Statistics testified as an expert.[7]

At the conclusion of the trial, the Plaintiff's case was submitted to the jury with instructions that "It is the Plaintiff's obligation of proving by a preponderance of the evidence that he was discharged because of his age." (App. D at 3. D), and that "In your deliberations and in arriving at your verdict, you will bear in mind that in an action of this kind the plaintiff has the burden of establishing his case by a preponderance of the evidence." (App. D at 6. D)

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4. Testimony of Curry.

5. Testimony of Curry. It should be noted that Curry did not claim that he was a victim of discrimination. He testified that he resigned at age 45 in protest to the blatant age discrimination which he was witnessing.

6. Testimony of Grecco.

7. The Statistical Expert acknowledged on cross examination that his data was based on subjective judgment material provided to him by Spang and that his conclusions could, therefore, be erroneous.

The jury returned a verdict in favor of the Plaintiff in the amount of $450,000.00.[8]

Subsequent to the jury's verdict, Grecco applied to the District Court for an Order of Reinstatement or, in the alternative, prospective damages in lieu thereof. After an extended hearing, the District Court awarded supplemental damages in the amount of $187,967.00.[9]

Spang applied to the Distrtict Court for a new trial or judgment N.O.V. which was denied. On appeal, the United States Court of Appeals for the Third Circuit affirmed the District Court.

REASONS FOR DENYING THE WRIT

I. A. The decision of the Court of Appeals affirming the District Court finding that Plaintiff's evidence was of such weight and sufficiency as to support the Plaintiff's verdict is consonant with the decisions of this Court and other Courts of Appeals on the subject. In addition, the decision below turns upon its own facts and will not affect other than the litigants.

Since it first filed its Motion for Summary Judgment many years ago, Spang has been urging that the evidence targeting the age bias of Frank Rath, Jr., known by and approved by the Chairman of Spang's Board, and the evidence of Rath, Jr.'s orchestration of the Plaintiff's termination was inadequate. Two Judges of the District Court have separately agreed on the weight and sufficiency of the Plaintiff's evidence.[10] The District Court's judgment has been thoroughly reviewed and affirmed by the Court of Appeals. Spang now asks this Honorable

8. Grecco had claimed past losses in excess of $600,000.00.

9. Grecco demonstrated future losses of salary, stock bonuses, and other emoluments in excess of One Million Dollars.

10. The Opinions of Judge Gustav Diamond denying Spang's Motions for Summary Judgment are reported at 527 F Supp. 978 (W.D. Pa. 1981) and 530 F.Supp. 782 (W.D. Pa. 1982).

Court to ignore its teaching in *United States v. Johnson*, 268 U.S. 220, 227 (1925) so as to grant certiorari to review evidence and to discuss specific facts.

In fact, the decision of the Third Circuit Court of Appeals in this case is fully in accord with the decisions of this Honorable Court. In *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147 (1982) and *Cooper v. Federal Reserve Bank of Richmond*, 104 S.Ct. 2794 (1984), we were taught that there is a crucial difference between the proof required in an individual's claim of discrimination and the proof required in a class action alleging a general pattern or practice of discrimination. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) and *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) as well as *Cooper, supra* are cases dealing with class actions and each of them recognizes the distinction between the burden of an individual claimant and one holding himself out to represent a group.

The trial and proof of an individual age discrimination claim is not governed by a rigid or mechanistic formula.

> "As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all of the evidence giving it whatever weight or credence it derserves. . . . See *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 at 358, Note 44."
>
> *U.S. Postal Service Board of Governors v. Aikens*, 103 S.Ct. 1478 (1983), Footnote 3.

I. B. The Decision of the Court Below is Consonant With the Decisions of Other Courts of Appeals.

The three cases cited by Spang to suggest conflict with other Circuits are readily distinguishable. The facts of *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984)

lacked the cohesive, binding testimony of Curry[11] whose testimony intimately related the terminations and discharges to Rath, Jr. and through him to Rath, Sr. That same weakness is obvious in *Goff v. Continental Oil Company*, 678 F.2d 593 (5th Cir. 1982). Additionally, the *Goff* court applied the class action language of *International Brotherhood of Teamsters, supra* and did not have the benefit of *U.S. Postal Service Board of Governors v. Aikens, supra*. *Pace v. Southern Railways System*, 701 F.2d 1383 (11th Cir. 1983) reviewed a Summary Judgment. Again, *Pace* lacked a Curry type cohesive witness. In addition, the Eleventh Circuit was reviewing the adequacy of a prima facie case rather than "the ultimate question of discrimination vel non". Cf *U.S. Postal Service Board of Governors, supra*, 103 S.Ct. at 1481, 1482.

I. C. The Decision of the Court Below Turns Upon the Facts of This Individual Case

The Circuit Court has issued a Memorandum Opinion not for publication which reflects the Court of Appeals further judgment that the written opinion will have no precedential or institutional value, and that the importance of the questions raised are confined to the parties involved.[12] Certiorari should not be granted to review weight and sufficiency of evidence and facts in such a case. *United States v. Johnson, supra*.

II. THE COURT'S CHARGE, READ AS A WHOLE, CORRECTLY INSTRUCTED THE JURY ON ITS RESPONSIBILITIES IN DETERMINING THIS INDIVIDUAL DISCRIMINATION CLAIM.

In two separate instances, the trial court informed the jury that it was the plaintiff's obligation to prove by a preponderance of the evidence that he was discharged because of his age. Thus, the plaintiff's burden on the

11. See Footnote No. 5.

12. Internal Operating Procedures for the United States Court of Appeals for the Third Circuit. V. A. 2.

ultimate question of discrimination "vel non" was clearly explained to the jury. The trial court's discussion of the shifting burdens of production under the McDonnell-Douglas approach is of no relevance to the ultimate burden explained to the jury.

The Court of Appeals correctly read the teaching of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) to apply only to the determination of "whether the litigants have created an issue of fact to be decided by the jury." (App. A at 8. A) Thus, the Court of Appeals followed the teaching of *U.S. Postal Service Board of Governors, supra* that after the finding of a prima facie case, "the McDonnell-Burdine presumption 'drops from the case' . . . and the factual inquiry proceeds to a new level of specificity". 103 S.Ct. at 1481, 1482.

Having moved to that "new level of specificity", the jury was correctly instructed on two occasions of the plaintiff's ultimate burden.

III. THE AWARD OF PROSPECTIVE DAMAGES PROVIDES THE FULL AND PROPER RELIEF CONTEMPLATED BY THE AGE DISCRIMINATION IN EMPLOYMENT ACT IN THOSE CASES WHERE REINSTATEMENT WOULD NOT BE IN THE BEST INTEREST OF THE PARTIES

When Congress enacted the Age Discrimination in Employment Act, it provided, in addition to the remedies taken from the Fair Labor Standards Act, that ". . . the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including, without limitation judgments compelling employment, reinstatement or promotion . . ." 29 U.S.C. §626(b).

This broad grant of equitable powers cannot be ignored. It is obvious that Congress intended that an age discrimination plaintiff should be "made whole"; that is,

restored to the economic position he would have occupied but for the unlawful conduct of the employer. Cf *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir. 1985).

The overwhelming majority of the Circuits which have considered the question have found prospective damages to be proper. See cases cited on Page 16 of Petitioner's Brief and *Maxfield*, *supra* at 796.

The Federal Courts have found no problem in projecting future damages in death, permanent and partial disability and other serious injury cases. There is no reason to assume that the federal judicial system becomes less competent when projecting damages in order to make a victim of discrimination whole.

CONCLUSION

The decision below, while it involves questions of importance only to the parties involved, is consonant with the decisions of this Court and the other Courts of Appeals on the issues raised. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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